No. 88-1463

Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1989

THOMAS W. WRENN, *Petitioner,*

-vs.-

STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of THE STATE OF NEVADA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITIONER'S REPLY MEMORANDUM

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October Term, 1989

THOMAS W. WRENN, *Petitioner*,

-vs.-

STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of THE STATE OF NEVADA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITIONER'S REPLY MEMORANDUM

QUESTIONS ADDRESSED IN RESPONDENT'S BRIEF IN OPPOSITION

Respondent addressed the following issues relative to its Brief in Opposition to Petition for Writ of Certiorari:

1. Whether or not the United States Supreme Court has jurisdiction.

2. Whether the decision of the Nevada Supreme Court raises a substantial and important question.

ARGUMENT

I. This Court Has Jurisdiction to Entertain This Petition Even Though the Federal Issue Was Not Directly Raised Until the Petition for Rehearing

The reason that equal protection was not directly raised until the petition for rehearing is that it was the first and probably only chance to present the matter to the Nevada Supreme Court. Brinkerhoff-Faris Trust Company v. Hill, 281 U.S. 673, 677, 678 (1930).

The State Court's decision was a surprise and could not have been reasonably anticipated from prior decisions. Herndon v. Georgia, 295 U.S. 441 (1935).

The fact that the Nevada Supreme Court denied the Petition for Rehearing without reference to the federal question will not

prevent this Court from exercising its jurisdiction. Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 366-67 (1932); Ohio ex rel. Bryant v. Akron Park District, 281 U.S. 74, 79 (1930); Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320 (1930); Saunders v. Shaw, 244 U.S. 317, 320 (1917) and Cole v. Arkansas, 333 U.S. 196, 200 (1948).

The entire thrust of Petitioner Wrenn's argument to the Nevada Supreme Court concerned the fundamental unfairness of any interpretation of the statutes which would deny Wrenn interest on past due benefits or deny Wrenn his attorney's fees when he had been deprived of free representation.

Those arguments of fundamental unfairness were addressed by the Court in briefs and oral argument and their Decision ignores the issue of fundamental unfairness which was their duty to address and correct.

The Respondent cites Weaver v. SIIS, 104 Nev. ___, 756 P.2d 1195 (1988) decided after all customary briefing was complete, and criticizes the Petitioner for failing to thrust the constitutional argument at the Nevada Supreme Court during a supplemental brief. Petitioner filed a supplemental brief attempting to show the difference between the facts of the Weaver case. The basic differences were that the Petitioner had been successful in his claim for interest at all stages of the proceedings and the delay in paying his benefits was substantially longer than Weaver. In addition, in Weaver, there was the argument that the Claimant was negligent in failing to request payment of benefits that had been awarded.

Respondent SIIS cited SIIS v. Snapp, 100 Nev. 290, 680 P.2d 590 (1984) for the proposition that the Nevada Supreme Court had previously decided the issue of attorney's

fees. There was substantial difference between Petitioner Wrenn's case and the Snapp decision. Snapp was not claiming attorney's fees as a result of being deprived of representation by the State Industrial Claimant's Attorney as Wrenn was. Therefore, the decision was under a totally different statute.

The Nevada Supreme Court has always liberally construed the statutes in favor of the workmen's compensation claimant to fully compensate and not deny compensation. SIIS v. Buckley, 100 Nev. 376, 682 P.2d 1387 at 1390 (1984). Under prior statute, the Nevada Supreme Court permitted interest on worker's compensation cases. NIC v. Strange, 84 Nev. 153, 437 P.2d 873 (1968).

The jurisdictional requirements that Federal Constitutional issues be presented to the highest State Court has been met. The Nevada Supreme Court just elected to ignore

the fundamental unfairness issue. (Petitioner has included in a Supplemental Appendix herein, the Petition for Rehearing filed with the Nevada Supreme Court.)

II. Once Programs Such as Workmens Compensation are Introduced to Protect Individuals from Financial Consequences of Injury, It is Important that the Program Treat all the Participants Substantially Equal and Any Interpretation of Legislation Which Would Permit the Primary Financial Benefits of Litigants To Be Reduced by Eighty Percent Only Because of Cost of Litigation and its Delay is Invidious Discrimination

This is not a case that just affects Mr. Wrenn. It affects all persons who must litigate to receive a correct benefit. Mr. Wrenn is totally disabled and made indigent by failing to receive correct benefits. It took over eight years to finally arrive at a correct basic benefit. Interest on delayed benefits is a fundamental

right necessary to equalize delayed benefits with those that are paid timely.

The Nevada Supreme Court relied on a **split** decision of an intermediate Court of Appeals in Oregon. Haret v. SAIF, 72 Or. App. 668, 697 P.2d 201, 204 (1985), *review denied*, 299 Or. 313, 702 P.2d 1110 (1985). Other than Nevada and Oregon, Petitioner's review reveals no other state when the issue was raised, failing to grant interest on delayed benefit payments.

Invidious discrimination has been defined as arbitrary, irrational, and not reasonably related to a legitimate purpose. See Kirk v. Board of County Com'rs, Muskogee County, Okl., 595 P.2d 1334, 1336 (1979) and Local No. 1 (ACA) Etc. v. I.B.T.,C.,W. & H., 419 F.Supp. 263, 277 (D.C. Pa., 1976).

The Nevada Supreme Court when

addressing the problem in SIIS v. Wrenn, 104 Nev. ___, 762 P.2d 884, 886 (1988) stated:

> "We have repeatedly refused to imply provisions not expressly included in the legislative scheme."

The Nevada Supreme Court overlooks the fact that Wrenn's request is to only make him **equal** with other claimants, not to be granted some additional benefit. The Nevada Supreme Court and SIIS treated Wrenn's request for interest and attorney's fees as a request for a new, substantive right and in this regard, their logic is flawed.

SIIS and the Court is permitting the interest earned off of these delayed benefits to be used by SIIS for other purposes. This is also true about their failure to pay for his attorney. What is particularly offensive about the Nevada Supreme Court's interpretation is that it is sending a message to SIIS that they can utilize claimants' benefits for other

purposes unless bad faith can be shown. [No reported cases.] What is even more egregious is that claimants when faced with this type of interpretation will be forced into unreasonable settlements and abandonment of their rights.

The interest earned on Wrenn's delayed benefits is equal to approximately seven years of benefit payments, almost enough to pay the entire back-payments that were due Mr. Wrenn.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and the reasons set forth herein, Petitioner's Wrenn's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 7, 1989

PETITIONER'S

SUPPLEMENTAL

APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

Filed November 8, 1988

No. 18763

STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of the State of Nevada,	)
Appellant,	)
vs.	)
THOMAS W. WRENN,	)
Respondent.	)

PETITION FOR REHEARING

Preliminary Statement

COMES NOW, Respondent, THOMAS W. WRENN, and petitions for rehearing pursuant to Rule 40 of the Nevada Rules of Appellate Procedure and respectfully request this Court to reconsider its Opinion entered on October 24, 1988, in the above case.

This petition is based upon the grounds that this Court's Opinion overlooks the

mandate of the provisions of the Fifth and Fourteenth Amendments to the United States Constitution in that a recipient of workmen's compensation benefits is entitled to have his benefits equal to the benefits payable to all other recipients of workmen's compensation. The Trial Court had determined that Respondent WRENN was entitled to interest on unpaid workmen's compensation benefits from the time they became due until paid and further reimbursed for attorney's fees for representation he was deprived of under a specific statute.

Argument

Mr. Wrenn engaged in litigation that extended over many years to collect workmen's compensation benefits he believed he was entitled to. During the course of that litigation, it was determined that he was entitled to representation without charge. However, the State Industrial Claimant's

Attorney withdrew from that representation without just cause and Mr. Wrenn was compelled to hire private counsel to successfully conclude his litigation.

Mr. Wrenn believed the only way that he could be treated equally to all other claimants for workmen's compensation in Nevada was for him to receive interest at the legal rate from the time his payments became due until the same were paid and further that he should be reimbursed for his actual attorney's fees. The Trial Court found authority for awarding interest in the general statutes of Nevada and authority for the payment of attorney's fees under the workmen's compensation statutes themselves.

This Court's Opinion herein discriminates against a claimant who must litigate to achieve his benefits and as such is a violation of the due process and equal

protection clauses of the Fifth and Fourteenth Amendment of the United States Constitution.

In this particular case, this Court singled out litigants in rendering its Opinion and has reduced the amount of benefits that Mr. Wrenn received substantially by depriving him of interest for the period where his benefits were not paid and the amount of money he had to pay for attorney's fees. This results in making his award substantially less than a claimant that received his benefits without the need of substantial and lengthy litigation.

There is no dispute that the Nevada legislature intended to make the benefits from workmen's compensation equal for all parties. There is certainly nothing in the legislation which would indicate that there was an intent that a person who is required to contest his claim should receive less than the

claimant who receives his benefits without any difficulty.

In fact the legislature and the Administrative Hearing's Officer determined that Mr. Wrenn was entitled to an attorney without charge and this right was only lost because the State Industrial Claimant's Attorney erroneously elected not to pursue an appeal. In addition, the State controlled agency administering the workmen's compensation laws, earned interest on all of the benefits that it was required to pay Mr. Wrenn from the time they became due until paid. The effect of the Opinion herein is that the State Industrial Insurance System profits from the delay in paying Mr. Wrenn's benefits and Mr. Wrenn suffers. What is a relatively small income for the system as a whole is a large expense to be borne by Mr. Wrenn alone.

When determining benefits due to a claimant, discrimination between litigants

and non-litigants has the same effect as discrimination between the sexes. Therefore, Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021 (1977) which concerned gender-based distinction between widows and widowers with regard to Social Security benefits has applicability here. Califano v. Goldfarb, 430 U.S. 199 at 212, 97 S.Ct. at 1029, stated in part as follows:

> "Therefore, *Wiesenfeld*, supra at 646-649, 95 S.Ct. at 1232, expressly rejected the argument of appellant's predecessor, relying on *Flemming v. Nestor*, that the 'non-contractual' interest of a covered employee in future social security benefits precluded any claim of denial of equal protection. Rather, *Wiesenfeld* held that the fact that the interest is 'noncontractual' does not mean that 'a covered employee has no right whatever to be treated equally with other employees as regards the benefits which flow from his or her employment,' nor does it 'sanction differential protection for covered employees which is solely gender based.' 420 U.S., at 646, 95 S.Ct. at 1232. On the contrary, benefits 'directly related to years worked and amount earned by a covered employee, and not to the need of the beneficiaries directly,'

like the the employment-related benefits in *Frontiero*, 'must be distributed according to classifications which do not without sufficient justification t differentiate among covered employees solely on the basis of sex.' 420 U.S., at 647, 95 S.Ct. at 1233."

CONCLUSION

For the reasons stated above, Respondent respectfully requests that this Court's Opinion issued on October 24, 1988 be reconsidered, and the Trial Court's decision affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

The undersigned certifies that she is an employee of R. PAUL SORENSON and on this 7th day of November, 1988, she deposited for mailing, postage prepaid, at Las Vegas, Nevada, a true copy of the Petition for Rehearing addressed to:

Douglas T. Quon
Associate General Counsel
STATE INDUSTRIAL INSURANCE SYSTEM
Post Office Box 26929
Las Vegas, Nevada 89126-0929

/s/ Sarah S. Higgins
An Employee of
R. PAUL SORENSON